

## A Conflict of Interests: Privacy, Truth, and Compulsory DNA Testing for Argentina's Children of the Disappeared

Elizabeth B. Ludwin King

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# A Conflict of Interests: Privacy, Truth, and Compulsory DNA Testing for Argentina's Children of the Disappeared

Elizabeth B. Ludwin King<sup>†</sup>

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## Abstract

From 1976 to 1983, Argentina was ruled by a military dictatorship that disappeared an estimated 30,000 suspected subversives, including parents of young children and pregnant women. Their children, either disappeared along with their parents or born in clandestine detention centers, were then taken from their parents and adopted, often by couples who were sympathetic with the government and knew of the children's origins.

This Article addresses Argentina's newest effort to identify these now-adult children: compulsory DNA testing in cases where the raising parents are suspected of having knowingly adopted their children illegally. It argues that, although the mandatory testing permissibly infringes on the adult child's right to privacy in favor of the biological grandparents' right to truth, better options satisfy the interests of both groups. It offers a framework for countries in conflict or transition that, in the future, may face a similar dilemma—the apparent need to identify an innocent person's biological origins amidst that individual's reluctance or refusal to submit voluntarily to DNA testing.

## Introduction

In May 2010, police in Buenos Aires, Argentina, raided the family home of adopted siblings Marcela and Felipe Noble Herrera to search for and seize personal items, including underwear and toothbrushes, for DNA testing.<sup>1</sup> Such searches are not uncommon in the criminal justice system, except that, in this case, the police suspected neither sibling of committing a crime.<sup>2</sup> Instead, their mother, Ernestina Herrera de Noble, was the focus of police efforts; they suspected her of illegally adopting her children during Argentina's military dictatorship in the 1970s and 1980s, when an estimated 500 children were born in clandestine detention centers.<sup>3</sup> Mrs. Herrera de Noble is the largest shareholder in Grupo Clarín, the company that controls Argentina's largest newspaper, among other media outlets.<sup>4</sup> Her children, now in their thirties, have no interest in knowing their biological origins, especially if doing so would implicate their mother.<sup>5</sup> They have refused to submit DNA samples to a court-approved laboratory, resulting in the court-ordered raid of their home in May. In December 2010, the Noble Herrera siblings were ordered to present themselves before the National

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1. Andres D'Alessandro & Chris Kraul, *Argentina Using DNA in 'Dirty War' Probe; Siblings Targeted in National Effort to Locate Orphans*, CHI. TRIB., June 14, 2010, at C26.

2. *Id.*

3. Andres D'Alessandro & Chris Kraul, *Argentina Tries to Uncover 'Dirty War' Orphans*, L.A. TIMES, June 9, 2010, available at <http://articles.latimes.com/2010/jun/09/world/la-fg-argentina-heirs-20100609>.

4. Sam Ferguson, *Children of Argentina Media Magnate Forced to Undergo DNA Testing*, CHRISTIAN SCI. MONITOR, June 7, 2010, available at <http://www.csmonitor.com/World/Americas/2010/0607/Children-of-Argentina-media-magnate-forced-to-undergo-DNA-testing>.

5. Editorial, *Intruding on the Lost*, GLOBE & MAIL (Can.), June 12, 2010, at A24. Ms. Herrera de Noble's husband died before the children were adopted.

Genetic Databank for additional testing, "with or without their consent."<sup>6</sup>

This most recent court order is a result of a law passed in November 2009,<sup>7</sup> amending the criminal procedure code to allow courts to obtain DNA samples from anyone who might be considered the child of a *desaparecido*, one of the estimated 30,000 people disappeared by the government during the dictatorship.<sup>8</sup> The law was seen as an important victory for the members of the NGO "Grandmothers of the Plaza de Mayo" (Abuelas), who have dedicated themselves to finding the children of the disappeared.<sup>9</sup> These cases are part of the Argentine government's attempt to hold the perpetrators of the atrocities committed during the dictatorship responsible. As a result of the new legislation, many of the people who devised the appropriation and illegal adoption scheme, as well as the parents who adopted the children knowing the circumstances under which they became available for adoption, are now facing charges in Argentine courts.<sup>10</sup>

Not everyone is applauding the new legislation, however.<sup>11</sup> While some adult children willingly undergo DNA tests to determine whether their biological parents were among the disappeared, others have no interest in such identification.<sup>12</sup> For these adult children, taking a DNA test betrays the parents who raised them.

Proponents of the law argue that it will help find the roughly 400 remaining people stolen as babies, while opponents see it as an invasion of privacy and an impermissible government intrusion.<sup>13</sup> The law clearly implicates both the right to privacy and the right to truth.<sup>14</sup> This Article considers whether the DNA law adequately protects both rights, and, if not, whether there are other solutions that could better satisfy both the Abuelas

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6. *La Justicia citó a los hermanos Noble a dar nuevas muestras de sangre y saliva para determinar su ADN*, LA NACIÓN (Arg.), Dec. 21, 2010, available at <http://www.lanacion.com.ar/1335524-la-justicia-cito-a-los-hermanos-noble-a-dar-nuevas-muestras-de-sangre-y-saliva-para-determinar-su-adn> (author's translation).

7. Law No. 26.549, Nov. 26, 2009 (Arg.) [hereinafter DNA law].

8. See Antonio Castillo, "Justice Came Late, but it Came," INSIDE STORY, July 5, 2010, <http://inside.org.au/justice-came-late-but-it-came/>; see also Jamie O'Connell, *Gambling With the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?*, 46 HARV. INT'L L. J. 295, 296 (2005).

9. See Castillo, *supra* note 8.

10. See *id.*

11. See generally Vicky Gashe, *Truth vs. Right to Privacy: The Battle of the Abuelas*, THE ARG. INDEP. (Apr. 6, 2010), <http://www.argentinaindependent.com/socialissues/humanrights/truth-vs-right-to-privacy-the-battle-of-the-abuelas/>.

12. In this article, the term "raising parents" will be used to denote the parents who are suspected of raising children whose biological parents were disappeared. The term "adult children" will be used in reference to these children, who are obviously no longer children in the legal sense, but who are still the children of their raising parents, and the grandchildren of their biological grandparents.

13. See *Argentina Forces DNA Tests in 'Dirty War' Cases: Law Requires Suspected Orphans Be Tested, Whether They Want To or Not*, ASSOCIATED PRESS, available at [www.msnbc.msn.com/id/34071255/nd/world\\_news-americas/](http://www.msnbc.msn.com/id/34071255/nd/world_news-americas/) [hereinafter Associated Press article].

14. As discussed *infra* Part IV, the right to truth involves the right of society and individuals to know the whereabouts and the fate of the disappeared.

and the adult children who do not want their DNA tested. Furthermore, this Article examines the effect of the Argentine DNA law in the context of international human rights; that is, the obligations that states have to their citizens.<sup>15</sup>

Although much is written about individual human rights, the scholarship lacks a discussion about how to proceed when the exercise of one right precludes the exercise of another. I argue that because international human rights law on this issue is inconclusive—both in terms of case law and statutory interpretation—international law permits Argentina to legislate in this murky area; therefore, the DNA law is valid. But I also argue that there are ways to achieve a better outcome that respects both the right to privacy and the right to truth. While there is no solution where everyone wins—where both the Abuelas and the adult children can fully exercise their rights—there are solutions that maximize satisfaction with the outcome.

By enacting the DNA law, Argentina adopted an accountability approach to the issue of the disappeared children. This approach is consistent with the focus in transitional justice over the past twenty or so years, which has been on the prosecution of perpetrators of human rights abuses.<sup>16</sup> With the establishment of modern international criminal tribunals, such as the International Criminal Tribunal for Yugoslavia, the International Criminal Tribunal for Rwanda, the International Criminal Court, and the Special Court for Sierra Leone, mechanisms such as truth commissions or lustration have fallen out of favor, or have at least taken a back seat to criminal prosecution.

In the Argentine situation, however, other forms of accountability may better serve the goals of both the Abuelas and the adult children who want to shield their privacy. In the event that the Argentine government discovers that the raising parents of a child of the disappeared were aware of their child's origins, imposing substitute criminal charges<sup>17</sup> would help allevi-

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15. It should be noted at the outset that this article is using, as a starting point, an example of conflicting rights in a rather unique context. Argentina's attempt to reconcile these two rights in the context of identifying adult children who were stolen thirty years ago and given to other families presents a number of issues that, while important, are outside the scope of the article. I focus on privacy and truth, though there are certainly arguments to be made about the right to identity in the Convention on the Rights of the Child, the right to bodily integrity, family law, and the best interests of the child standard. See Convention on the Rights of the Child arts. 8, 19, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2 1990) [hereinafter CRC]; see also International Covenant on Civil and Political Rights arts. 7, 17, Dec. 16, 1966, 999 U.N.T.S. 171, (entered into force Mar. 23, 1976) [hereinafter ICCPR]; [European] Convention for the Protection of Human Rights and Fundamental Freedoms art. 5, Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953), as amended by Protocols Nos. 3, 5, 8, and 11 (entered into force Sept. 21, 1970, Dec. 20, 1971, Jan. 1, 1990, and Nov. 1, 1998 respectively) [hereinafter European Convention].

16. See, e.g., *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda) 2005 I.C.J. 168 (Dec. 19, 2005).

17. As will be discussed *infra* Part V, substitute criminal charges involve charging a person with a lesser crime than what he or she could be charged with or is suspected of having committed. For example, this practice occurs in U.S. courts when prosecutors

ate, from a judicial standpoint, some of the concerns the adult children have about the effects of DNA test results on their raising parents. At the same time, the Abuelas would be able to identify more children of the disappeared. An even better option, however, is to place the burden on the raising parents to come forward, and to provide a full accounting of how their adopted children came into their lives. The Argentine government could offer amnesty to raising parents who come forward, thereby meeting the twin goals of discovering the truth and preserving the privacy of the adult children.<sup>18</sup> Neither option, it must be noted, is completely satisfactory to the adult children who want to remain in the dark, but if the Argentine government is determined to proceed with efforts to identify children of the disappeared, these alternatives are superior to the government's current efforts and better protect the privacy interests of the adult children.

From the Argentine experience, we can construct a framework for government leaders who find themselves in a situation where using DNA evidence to ascertain the biological origins of innocent people appears necessary to further a legitimate interest—in this case, truth and accountability. This framework suggests that balancing certain factors, such as the age of the individuals targeted for identification and the country's capacity to house and test the DNA, will offer guidance on whether compulsory DNA testing is the best way, or even a necessary way, to achieve the state's goals. Such a framework will be useful, for example, in the aftermath of a conflict in which rape was a common tactic, and the country wants to identify children born of rape, perhaps as a way to strengthen charges against members of the military or rebel groups.

The first part of this Article provides a brief overview of the context in which the DNA law was passed. It offers some background on the conflict in Argentina and the dictatorship's plan to place children of the disappeared with families sympathetic to the government. Part I then focuses on the work of the Abuelas, and discusses the development of the National Genetic Databank and the details of the DNA law.

Part II frames both this seemingly unique example and the larger issue of the clash of rights in a wider context. It posits that the Argentine situation is not as rare as it appears, and that the steps Argentina takes to address the atrocities of its past are scrutinized by the international community as it also grapples with issues of post-conflict justice. Part III examines the human right to privacy, including permissible limitations. Part IV considers the recently established right to truth and how it has been invoked in the past.

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charge a suspected *Mafioso* with money laundering and not murder, or when prosecutors charge a suspect with a lesser offense in return for his or her testimony against another suspect.

18. Of course, a grant of amnesty sacrifices the government's goal of criminal enforcement. In many cases, however, the raising parents suspected of having illegally adopted children are also suspected of other crimes connected to the military dictatorship. In the event that illegal adoption is the only charge at issue, the government will need to determine if the goal of criminal enforcement trumps the goal of truth.

Finally, Part V addresses the main issue of this article: what does international human rights law say about the rights in conflict? This Part argues that the validity of the DNA law under international human rights law is unclear, and thus, that under established international law, Argentina is free to legislate in this area. This part also contends that despite the validity of Argentina's approach, there are better solutions to the problem of trying to identify the biological origins of adult children who do not want to participate in this inquiry. Through either the imposition of substitute criminal charges for guilty raising parents or the issuance of amnesty in return for the truth, the interests of the biological families and the adult children can be better served. In addition, this Part offers a framework that leaders in other countries in similar situations may use to assess the options available to them when making the tough decisions about truth and privacy in the context of transitional justice.

### I. Compulsory DNA Testing in the Argentine Context

The passage of the Argentine DNA law in November 2009 is the latest attempt by the government to punish the perpetrators of the many atrocities committed by the junta in the 1970s and 1980s. To understand why the law was proposed, it is first necessary to place it in a historical context. In response to the disappearances that occurred during the dictatorship, various groups began to seek answers regarding the whereabouts of their children and grandchildren.<sup>19</sup> The Abuelas were one such group, and they remain committed to identifying their missing grandchildren who were either born in clandestine detention centers to disappeared parents, or already born and then disappeared along with their parents.<sup>20</sup> It was the Abuelas who pushed for the establishment of a genetic database to store DNA from people whose identity was uncertain.<sup>21</sup> DNA testing then became evidence used in trials of people suspected of illegally adopting their children.<sup>22</sup> To resolve inconsistencies among courts about the propriety of ordering DNA tests, the law approving compulsory DNA testing was passed in November 2009.

#### A. The Process of National Reorganization, 1976 to 1983

Following a period of violence in the 1970s, the military junta came to power with popular support and ruled Argentina with a reign of terror from 1976 to 1983.<sup>23</sup> The country was initially hopeful that the military would be able to restore the rule of law and bring peace to the society.<sup>24</sup>

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19. See Castillo, *supra* note 8.

20. See *id.* Certainly there are others who are interested in locating the children of the disappeared, but the Abuelas are the most widely known and active group.

21. See *id.*

22. See *id.*

23. Jose Sebastian Elias, *Constitutional Changes, Transitional Justice, and Legitimacy: The Life and Death of Argentina's "Amnesty" Laws*, 31 HASTINGS INT'L & COMP. L. REV. 587, 591-92 (2008).

24. See *id.*

Instead, the junta immediately began its Process of National Reorganization (El Proceso).<sup>25</sup> In El Proceso, the dictatorship targeted “not only persons espousing leftist subversion, but anyone suspected of opposing the military regime, including priests, union workers, teachers, lawyers, psychologists, journalists, and students.”<sup>26</sup> Government agents embarked on a campaign of terror, disappearing thousands of people, most of whom were never seen again.<sup>27</sup> These alleged “subversives” were taken from their homes, their places of work, or off the street, often in broad daylight, brought to one of the dictatorship’s many clandestine detention centers, and tortured relentlessly.<sup>28</sup> Estimates of the number of people disappeared by the dictatorship reach as high as 30,000.<sup>29</sup> The crimes committed during what became known as the Dirty War included forced disappearance,<sup>30</sup> torture, murder, kidnapping, and the illegal adoption of children.<sup>31</sup> In 1982, facing growing pressure to curtail the widespread human rights abuses, the junta mounted one last effort to retain power, and launched a war to reclaim the Falkland Islands/Islas Malvinas.<sup>32</sup> The Argentine military was quickly defeated, left in a weakened condition, and forced to accept the inevitability of democratic elections.<sup>33</sup>

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25. See *id.*

26. Terence S. Coonan, *Rescuing History: Legal and Theological Reflections on the Task of Making Former Torturers Accountable*, 20 *FORDHAM INT’L L.J.* 512, 517 (1996).

27. The number of people disappeared by the military dictatorship remains in question. Official government estimates hover around 9,000, although human rights groups believe the number to be much higher, at approximately 30,000. See Jo M. Pasqualucci, *The Whole Truth and Nothing But the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System*, 12 *B.U. INT’L L.J.* 321, 327 (1994) (giving the estimate at 9,000); see also Christopher J. Walker, *Judicial Independence and the Rule of Law: Lessons from Post-Menem Argentina*, 14 *SW. J. L. & TRADE AM.* 89, 100 (2007) (providing an estimate of 30,000 by human rights groups).

28. See generally COMISIÓN NACIONAL SOBRE LA DESAPARICIÓN DE PERSONAS [NATIONAL COMMISSION ON THE DISAPPEARANCE OF PERSONS], *NUNCA MÁS [NEVER AGAIN]: REPORT OF CONADEP* (1984), available at [http://web.archive.org/web/20030803004404/nunca.mas.org/english/library/nevagain/nevagain\\_000.htm](http://web.archive.org/web/20030803004404/nunca.mas.org/english/library/nevagain/nevagain_000.htm) [hereinafter *NUNCA MÁS*].

29. See O’Connell, *supra* note 8, at 296.

30. Based on Argentina’s Dirty War and similar tactics used by other South American governments in the 1970s and 1980s, the Organization of American States codified a prohibition on forced disappearances in the *Inter-American Convention on Forced Disappearance of Persons*, which entered into force in March 1996. See Organization of American States, *Inter-American Convention on Forced Disappearance of Persons*, June 9, 1994, 33 *I.L.M.* 1529 (entered into force Mar. 28, 1996). Current signatories include Argentina, Brazil, Bolivia, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela. *Id.* In addition, a 1992 United Nations General Assembly declaration stated that no state may “practice, permit, or tolerate” forced disappearances. Declaration on the Protection of All Persons from Enforced Disappearance, G.A. Res. 47/133, U.N. GAOR, 47th Sess., Supp. No. 49, U.N. Doc. A/47/49(I), art. 2(1) (1992). The principle of legality prevents Argentina from charging suspects from the time of the dictatorship with the crime of enforced disappearance, as the Argentine Code of Criminal Procedure did not include this crime until well after the dictatorship ended.

31. Castillo, *supra* note 8.

32. See Elias, *supra* note 23, at 592; see also David Weissbrodt & Maria Luisa Bartolomei, *The Effectiveness of International Human Rights Pressures: The Case of Argentina*, 1976-1983, 75 *MINN. L. REV.* 1009, 1031 (1991).

33. See Weissbrodt & Bartolomei, *supra* note 32, at 1031-32.



One of the more chilling aspects of El Proceso was the organized way in which the junta kidnapped children—either babies born in the detention centers’ “maternity wards”<sup>34</sup> or young children whose parents were disappeared—and gave them to couples sympathetic with the regime, or even to the very military or police officers who participated in the torture and killing of the children’s parents.<sup>35</sup> These families either falsified identification papers to indicate that the children were born to them, or registered illegal adoption papers.<sup>36</sup> Moreover, when allegations of kidnapping and illegal adoption came to light, some parents fled Argentina with their children in what are known as “second disappearances.”<sup>37</sup> The theft and distribution of the children of the disappeared became known as “war booty” (*botín de guerra*).<sup>38</sup> It was this climate of brutal repression and secrecy that gave rise to the formation of groups like the Abuelas.

## B. Activism Amid Atrocity

Despite the horrors of the military dictatorship, there were people questioning the regime and its practices from the start. Perhaps the most well-known activist group, the Mothers of the Plaza de Mayo (Madres), began marching in front of the Argentine president’s house in 1977 to demand information about the whereabouts of their disappeared children.<sup>39</sup> Their constant presence—they still march every Thursday—put pressure on the government to make public the secrecy of its actions.<sup>40</sup>

In 1977, an offshoot of the Madres, the Abuelas formed to focus not on the disappeared children, but on the “living disappeared”—the Abuelas’ grandchildren who were taken along with their parents or were born to pregnant women disappeared by the regime.<sup>41</sup> The Abuelas “were not motivated by revenge but by a desire simply to know that their grandchildren were alive and well.”<sup>42</sup> They received denunciations from people believing that a family member was among the children of the disappeared, appealed to international media, and scoured birth certificates and adoption records for any information that could lead to the identification of their grandchildren.<sup>43</sup>

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34. Three percent of the women who were disappeared by the military dictatorship were pregnant at the time they were disappeared. NUNCA MÁS, *supra* note 28. The most notorious detention center, the Navy School of Mechanics (ESMA), had a maternity ward where prisoners gave birth and then were killed. *See id.*

35. See Laura Oren, *Righting Child Custody Wrongs: The Children of the “Disappeared” in Argentina*, 14 HARV. HUM. RTS. J. 123, 123 (2001).

36. *See id.* at 128.

37. See Lisa Avery, *A Return to Life: The Right to Identity and the Right to Identify Argentina’s “Living Disappeared”*, 27 HARV. WOMEN’S L.J. 235, 259 (2004).

38. See Oren, *supra* note 35, at 128.

39. See *History of Abuelas de Plaza de Mayo*, ABUELAS DE PLAZA DE MAYO, <http://www.abuelas.org.ar/english/history.htm> (last visited May 27, 2011) [hereinafter *Abuelas de Plaza de Mayo*].

40. *See id.*; see also Avery, *supra* note 37, at 247–48.

41. See Avery, *supra* note 37, at 247.

42. *Id.*

43. *See id.*

The Abuelas' work paid off. In 1980, they located the first two children stolen by the dictatorship and given to a military family.<sup>44</sup> Moreover, after the dictatorship ended and Argentina returned to a civilian government, the Abuelas were able to pressure the government into supporting their search.<sup>45</sup> In 1992, the Interior Ministry established the Commission on the Right to Identity (CONADI), which centralized efforts to locate the missing children, and had both investigatory and prosecutorial powers.<sup>46</sup> The Abuelas' goal was to restore the children's identities and return them to their biological families. The Abuelas felt they "owe[d] that to [their] children, to find *their* children and tell them who their parents were . . . that they were good, life-loving young people like them who died for a principle."<sup>47</sup>

### C. The National Bank of Genetic Data and DNA in the Courtroom

In 1987, just four years into the new civilian government, the Argentine Congress established the National Bank of Genetic Data, due in large part to the work of the Abuelas and advances in identification science and technology.<sup>48</sup> It was the first genetic database of its kind, and it offered its services free of charge to anyone whose identity was at issue and to relatives of the disappeared.<sup>49</sup> It was created to house genetic data and to produce reports and expert opinions. Family members of the disappeared, including children who suspected that their parents had been disappeared, could submit DNA.<sup>50</sup>

In August 2009, a mere three months before the Argentine Senate passed the law permitting compulsory DNA testing, the Argentine Supreme Court ruled to the contrary, holding that judges may not force people to give blood samples for genetic testing to determine whether or not they are children of the disappeared.<sup>51</sup> Perhaps setting the stage for the DNA law, the Court said that despite its ruling, less invasive ways of obtaining the DNA, such as seizing personal items, would pass constitutional muster.<sup>52</sup>

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44. See Oren, *supra* note 35, at 129.

45. See Avery, *supra* note 37, at 253.

46. See *id.*

47. Howard LaFranchi, *Relentless Grandmothers: Argentina Seeks Justice for Kidnapped Children*, CHRISTIAN SCI. MONITOR, Nov. 3, 1999, at 1. There were instances where the raising parents were innocent of any wrongdoing, having believed that they were legally adopting unwanted children. Internet Interview with Leonardo Filippini, Law Professor at the University of Palermo and the University of San Andrés in Buenos Aires (Sept. 22, 2010) (transcript on file with the author). In these situations, the Abuelas maintained that the children could stay with their adoptive families, rather than being returned to their biological ones, as long as the biological family members had a role in the children's lives. See Avery, *supra* note 37, at 255.

48. See Law No. 23,511, June 1, 1987, [XLIV-D], A.D.L.A. 3373, <http://infoleg.mecon.gov.ar/scripts1/busquedas/cnsnorma.asp?tipo=Ley&nro=23511>.

49. See Avery, *supra* note 37, at 252.

50. See Oren, *supra* note 35, at 149.

51. See *Argentina's Supreme Court Rejects Forced Blood Tests on Suspected 'Dirty War' Orphans*, HAMILTON SPECTATOR, Aug. 11, 2009 [hereinafter HAMILTON SPECTATOR].

52. Memorandum from Centro Internacional para la Justicia Transicional [ICTJ] on Obtención de muestras de ADN en el proceso penal [Obtaining DNA Samples in the

The case involved a couple who registered two children of the disappeared as the couple's own children.<sup>53</sup> When this fact came to light, the Abuelas were able to get a judge to order the adult children to give blood samples, and they refused.<sup>54</sup> According to two of the Justices, "[t]he right of biological families to know the truth does not mean that the other victim should shoulder all the emotional and legal consequences of establishing a new identity."<sup>55</sup>

Beginning in 2006, federal judges in Argentina started to order searches of people's homes, largely due to the refusal of individuals suspected of being children of the disappeared to undergo DNA testing.<sup>56</sup> Many of those refusing did so because they did not want to provide evidence for legal action against their parents.<sup>57</sup> Interestingly, in Argentine Supreme Court cases in the mid-1990s, where the raising parents asserted that compulsory blood tests violated their own right to privacy, the Court held that there was no violation because the basis of the raising parents' argument was to create an obstacle to the investigation. Moreover, the Court held that the issue was one of standing: The raising parents were the suspects, while the children were victims and third parties to the case.<sup>58</sup>

#### D. Compulsory DNA Testing Becomes Official Procedure

In November 2009, based on the outcomes of these cases and the need for a uniform approach to DNA testing in cases of illegal adoption and falsification of identity, the Argentine Congress amended Article 218 of the National Criminal Procedure Code to allow judges to order compulsory DNA testing in certain circumstances.<sup>59</sup> In these situations, judges may issue warrants in order to obtain DNA samples from personal items.<sup>60</sup> Under the new Article 218, the judge's decision to order the test must be based on the principles of necessity, reasonableness, and proportionality.<sup>61</sup> Furthermore, the least intrusive methods of obtaining the DNA must be used, taking gender and other circumstances into consideration.<sup>62</sup> In no circumstance may the methods exceed the minimum level of coercion

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Penal Process] to el Senado de la Nación Argentina [Senate of Argentina] 9 (Nov. 17, 2009), <http://es.ictj.org/images/content/1/8/1854.pdf>. See also Corte Suprema de la Justicia de la Nación [CSJN] [Supreme Court for the Justice of the Nation], 08/11/2009, "Gualtieri Rugone de Prieto, Emma Elidia y otros s/sustracción de menores de 10 años" - causa n° 46/85A, (Arg).

53. See HAMILTON SPECTATOR, *supra* note 51.

54. See *id.*

55. See *id.*

56. See Sebastián Lacunza, *New Methods to Identify Dictatorship's Missing Children*, INTER PRESS SERVICE (Sept. 30, 2008), <http://ipsnews.net/news.asp?idnews=44076>.

57. See *id.*

58. See Oren, *supra* note 35, at 154.

59. DNA Law, *supra* note 7.

60. See Ximena Marinero, *Argentina Senate Approves Law to Compel DNA from Suspected 'Dirty War' Children*, JURIST (Nov. 20, 2009), <http://jurist.org/paperchase/2009/11/argentina-senate-approves-law-to-compel.php>.

61. CODE CRIMINAL [C. CRIM] art. 218bis, para. 1.

62. *Id.* at para. 3.

required.<sup>63</sup> The law specifies that, if a criminal prosecution requires a DNA sample from the victim, the extraction of the DNA must be done in a way that prevents revictimization and protects the victim's rights.<sup>64</sup> If the victim refuses to provide DNA, the judge may order the seizure of personal items.<sup>65</sup> The law as written does not provide any recourse to someone who wants his or her privacy protected and who does not want to provide a DNA sample. Having one's possessions seized for testing cannot be called a suitable alternative; the right to privacy is still violated in this scenario.<sup>66</sup>

Despite this apparent victory for the Abuelas and others trying to establish their own identity or the identity of others, the law has critics. In November 2009, a survey conducted by *La Nación*, a conservative newspaper, showed that 77% of its readers opposed the law.<sup>67</sup> Some critics say that the compulsory extraction of DNA violates privacy rights<sup>68</sup> and the victim's right to choose not to know his or her biological origins.<sup>69</sup> Former prosecutor Julio Strassera, who put some of the former junta leaders on trial, argues, "If an adult doesn't want to know his origins, you have to respect that."<sup>70</sup>

Furthermore, the law may be the first of its kind to require compulsory DNA testing of people not suspected of crimes.<sup>71</sup> There are also concerns that the law could be read expansively, giving judges too much discretion to decide when DNA extraction is "absolutely necessary."<sup>72</sup> Though concerns about the DNA law go beyond the concerns of adult children who do not want to know their biological origins, dialogue about the law has focused on this specific situation.

Proponents of the law, however, contend that the need to clarify the events for the historical record, and the human rights violations at issue tip the balance in favor of compulsory testing over privacy.<sup>73</sup> Still others maintain that the adult children should not be put in a position where they have to decide whether or not to seek their true identity. Horacio Pietragalla, who learned in 2003 that he was a child of the disappeared, insists that, "The state cannot leave in the hands of a young person, raised by a member of the military, manipulated by guilt, the decision of whether to not to learn his true identity."<sup>74</sup> Of course, taking this very personal, perhaps life-

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63. *Id.* at para. 4.

64. *Id.* at para. 5.

65. *Id.*

66. Although there is certainly a difference between seizure for criminal prosecution purposes and seizure due to private interests, in this scenario the very personal items—the genetic material of the completely innocent individual—is being forcibly seized.

67. Joel Richards, *New DNA Law in Argentina Will Help Find the Missing Grandchildren*, NORTH AMERICAN CONGRESS ON LATIN AMERICA, NOV. 12, 2009, at 1–2.

68. See Lacunza, *supra* note 56.

69. See Marinero, *supra* note 60.

70. See Associated Press article, *supra* note 13.

71. See *id.*

72. See *id.*

73. See Lacunza, *supra* note 56.

74. See Associated Press article, *supra* note 13.

changing decision out of the adult children's hands amounts to forcing unwanted knowledge on them.

Thus, while the proponents of the DNA law argue for truth and knowledge of the events that transpired during the dictatorship, critics assert the primacy of the individual's right to privacy. Supported by the tireless work of the Abuelas and the Argentine government, the law and the National Bank of Genetic Data are designed to assist in the search for justice following the horrific events of the Dirty War.

## II. A Unique Set of Facts?

At first blush, the stolen baby situation seems truly unique: Children are taken from their parents and given to others; then, after thirty years, groups attempt to identify the biological origins of these adult children through the use of compulsory DNA tests, the results of which could put the raising parents in jail. Argentina is not, however, the first country to separate parents and children as a way to redirect the values of the next generation.<sup>75</sup> One can easily think of other contexts in which Argentina's approach to this issue can provide guidance for the future.

In fact, nearly any situation in which families are separated can be analogized to the Argentine context. For example, in the aftermath of the 1994 Rwandan genocide, surviving women—both Hutu and Tutsi—were known to raise orphaned children.<sup>76</sup> Natural disasters and wars may separate children from their parents. Not knowing who is still alive, survivors proceed in a new life as best they can. Years later, these children may not want to know if the people who have raised them are their biological parents.

These circumstances lack the criminal context present in Argentina, but we may see a comparable situation in the future. For example, once the conflict in the Democratic Republic of Congo (DRC) has ended, we will face the question of whether prosecutions as a form of transitional justice should occur.<sup>77</sup> The hostilities in the DRC have been marked by the heavy use of rape as a weapon of war.<sup>78</sup> In this "Rape Capital of the World," over

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75. The dictatorship's plan of having the children of the disappeared raised by families sympathetic to the government may have been inspired by General Franco in Spain. See Castillo, *supra* note 8. In addition, from the late 1800s through the mid-1900s, the government of Australia engaged in a systematic campaign to remove Aboriginal children from their homes and place them with Caucasian families as a way to eradicate the Aboriginal way of life. See generally, PETER READ, *THE STOLEN GENERATIONS: THE REMOVAL OF ABORIGINAL CHILDREN IN NEW SOUTH WALES 1883 TO 1969*, (4th ed. 2006), available at <http://www.daa.nsw.gov.au/publications/StolenGenerations.pdf>.

76. See Jessica Roemischer, *Ladies First, WHAT IS ENLIGHTENMENT?*, Dec. 2005-Feb. 2006, available at <http://www.enlightennext.org/magazine/j31/reviews.asp?page=4> (reviewing PBS's "Wide Angle" Production, "[a] video and multimedia presentation on women in Rwanda").

77. The Democratic Republic of Congo has experienced a brutal war for at least the past decade, and rape has been increasingly used as a war tactic. See, e.g., Jeffrey Gettleman, *600 Raped on Border of Congo*, U.N. Says, N.Y. TIMES, Nov. 6, 2010, at A4.

78. See Joy Wanjia, *Culture of Impunity Thrives in the Rape Dens of Eastern Congo*, EAST AFRICAN (Ken.), Dec. 27, 2010, <http://www.theeastafrican.co.ke/news/Culture-of-impu->

200,000 cases of rape and sexual assault have been reported and thousands more have likely gone unreported since the conflict began in 1996.<sup>79</sup> It is highly likely, therefore, that there have been children born, and that there will be children born, as the result of rape. Should the DRC decide to prosecute the perpetrators of the atrocities during the conflict, prosecutors might add rape to the litany of available charges. In such a case, a child born of rape could provide DNA evidence. Like their counterparts in Argentina, however, these children may prefer not to know their biological origins.<sup>80</sup>

Thus, while the facts leading to the passage of the DNA law in Argentina and the resulting conflict between the rights to truth and privacy seem specific to the context of the Argentine dictatorship, they may appear in other situations around the world. How Argentina addresses this issue is relevant beyond its borders, given its contributions and past efforts at justice in the wake of mass atrocity. Argentina was one of the first countries to pursue trials in the transitional justice context,<sup>81</sup> and it has also employed amnesties,<sup>82</sup> the first well-known truth commission,<sup>83</sup> and truth trials,<sup>84</sup> among other mechanisms of justice.<sup>85</sup> Moreover, in its quest for justice,

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nity+thrives+in+the+rape+dens+of+eastern+Congo+/-/2558/1078712/-/auauokz/-/index.html.

79. See Joy Wanja, *The Congo Raping Fields*, DAILY NATION (Ken.) (Dec. 20, 2010), <http://www.nation.co.ke/Features/DN2/The+Congo+raping+fields+/-/957860/1075658/-/mwfgqp/-/index.html>.

80. The DRC example differs from the Argentine context, of course, in the sense that the child will likely not have an attachment to the parent who committed the crime (in this case, rape).

81. See Panel: *The Justice Cascade in Latin America*, 5 SANTA CLARA J. INT'L L. 345, 346 (2007) (symposium transcript of Naomi Roht-Arriaza's statement).

82. See Law No. 23.492, Dec. 24, 1986, [XLIV-A] A.D.L.A. 1100 (Full Stop Law) (imposing a 60-day statute of limitations for all crimes related to the Dirty War, thereby limiting the number of cases that could be brought before Argentine courts); see also Law No. 23.521, June 4, 1987, [XLIV-A] A.L.J.A. 260 (Due Obedience Law) (providing an irrefutable presumption of innocence for any medium or lower rank member of the armed forces based on the doctrine of command responsibility).

83. See PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY* 16 (2002).

84. EAAF (EQUIPO ARGENTINO DE ANTROPOLOGÍA FORENSE), *Special Section: Right to Truth*, in 2002 ANNUAL REPORT 130, 131 (2002). Truth trials involve the investigation of human rights abuses protected by an amnesty. The objective is to develop a record of the truth, though no criminal penalties are imposed. See *id.*

85. A country emerging from conflict characterized by mass atrocity has several options for dealing with the past, depending on the country's attitudes and goals for the future. Truth commissions, in which testimony is taken from anyone affected by the conflict who wants to share his or her story, aim to create a historical record of the events. A country preferring truth above all else might opt for the establishment of a truth commission. Trials are an option for a country pursuing justice, though only individuals can be put on trial, which can present challenges when entire governments are responsible for the crimes committed. Amnesties or pardons are more likely to be selected as a transitional justice mechanism when the new government wants to forge ahead and look to the future instead of the past. For more on mechanisms of accountability, see Elizabeth B. Ludwin, *Trials and Truth Commissions in Argentina and El Salvador*, in *ACCOUNTABILITY FOR ATROCITIES: NATIONAL AND INTERNATIONAL RESPONSES* 275-76 (Jane E. Stromseth ed., 2003). Also, see generally HAYNER, *supra* note 83; and Ivan

Argentina formed the first forensic anthropology team, which, since its creation in 1986 to identify the disappeared, has worked in over thirty countries.<sup>86</sup> Argentina has been experimenting with post-conflict justice initiatives for nearly thirty years, and countries in transition have benefited from the Argentine transitional justice experience. During this time, the international community has been watching and taking notes; the compulsory DNA testing of innocent adults to build evidence in criminal cases against their parents is another experiment in transitional justice that the world will scrutinize.

### III. The Right to Privacy: Fundamental, But Not Absolute

Of the two rights pitted against each other by the enforcement of Argentina's DNA law, the right to privacy is more established in international human rights law.<sup>87</sup> Under the DNA law, the adult child suspected of having been illegally adopted is unable to exercise her right to privacy, which, in this case, is her ability to control the dissemination of information about herself. It is not the minimal intrusion of a cheek swab that presents the problem; what matters is the information contained on that swab and what happens to it. The privacy violation is, thus, the same, whether the DNA is obtained via cheek swab or seizure of personal items. By examining the various definitions and interpretations of the right to privacy, how it has developed, where it is codified, and how it has been applied in the international human rights arena, one can get a clearer picture of the right to privacy and how it may conflict with other rights.

#### A. International Sources of a Right to Privacy

The right to privacy is a fundamental right, first enunciated in the 1948 Universal Declaration of Human Rights (UDHR): "No one shall be subject to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."<sup>88</sup> It includes the right to control access to personal information about oneself, which is at the crux of the DNA law controversy.<sup>89</sup> When construed narrowly, privacy encompasses this very idea: the control of dissemination of personal information. When construed more broadly, however, notions of privacy include anonymity and restrictions on physical

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Simonovic, *Attitudes and Types of Reaction Toward Past War Crimes and Human Rights Abuses*, 29 YALE J. INT'L L. 343 (2004).

86. See O'Connell, *supra* note 8, at 322.

87. As will be addressed in the next section, the right to truth is a relatively newly-established right in the human rights spectrum, whereas the right to privacy was codified as early as 1948 in the Universal Declaration on Human Rights. See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 12 (Dec. 10, 1948) [hereinafter UDHR].

88. *Id.*

89. See Daniel E. Newman, *European Union and United States Personal Information Privacy, and Human Rights Philosophy - Is There a Match?*, 22 TEMP. INT'L & COMP. L.J. 307, 312 (2008).

access.<sup>90</sup>

Although the right to privacy gained prominence in international human rights law after its inclusion in the UDHR, concerns about personal privacy in the European Union have historical roots in the way the Nazis seized personal records in order to target specific people in the 1930s and 1940s.<sup>91</sup> More recently, domestic privacy laws have been adopted and amended in countries in Central Europe and South America to remedy injustices of prior authoritarian regimes.<sup>92</sup>

The right to privacy has been included in several major human rights instruments: the UDHR,<sup>93</sup> the International Covenant on Civil and Political Rights (ICCPR),<sup>94</sup> and the Convention on the Rights of the Child,<sup>95</sup> as well as regional human rights conventions in Latin America,<sup>96</sup> the Middle East,<sup>97</sup> and Europe.<sup>98</sup> The right has generally proceeded down two paths, with some agreements treating privacy as a negative right prohibiting arbitrary interference with what is typically treated as the private sphere: the home, the person, and correspondence.<sup>99</sup> Other conventions treat privacy as a positive right, asserting that everyone has a right to respect for his home, his personal life, and his correspondence.<sup>100</sup> On a domestic level,

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90. Norbert Gilmore, *Drug Use and Human Rights: Privacy, Vulnerability, Disability, and Human Rights Infringements*, 12 J. CONTEMP. HEALTH L. & POL'Y 355, 409 (1996).

91. See Newman, *supra* note 89, at 328.

92. See *Privacy and Human Rights: An International Survey of Privacy Laws and Practice*, GLOBAL INTERNET LIBERTY CAMPAIGN, <http://gilc.org/privacy/survey/intro.html> (last visited Jan. 29, 2011).

93. See UDHR, *supra* note 87, at art. 12.

94. See ICCPR, *supra* note 15, at art. 17.

95. See CRC, *supra* note 15, at art. 16.

96. See Organization of American States, American Convention on Human Rights art. 11, Nov. 21, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978) [hereinafter ACHR].

97. See Cairo Declaration on Human Rights in Islam, art. 18, U.N. GAOR, 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (Aug. 5, 1990) [hereinafter Cairo Declaration].

98. See European Convention, *supra* note 15. Interestingly, the African (Banjul) Charter on Human and Peoples' Rights is silent as to the right to privacy, which likely reflects the notion that the Charter focuses on collective, not individual, rights. See Organization of African Unity, African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), (entered into force Oct. 21, 1986) [hereinafter Banjul Charter].

99. Special Rapporteur on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, U.N. Doc. A/64/211 (Aug. 3, 2009) (by Martin Scheinin) [hereinafter Scheinin]; see also ICCPR, *supra* note 15, at art. 17; UDHR, *supra* note 87, at art. 12; CRC, *supra* note 15, at art. 16; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 14, G.A. Res. 45/158, U.N. Doc. A/RES/45/158 (Dec. 18, 1990) (entered into force July 1, 2003) (stating in language similar to the other conventions cited, "No migrant worker or member of his or her family shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home, correspondence or other communications, or to unlawful attacks on his or her honour and reputation. Each migrant worker and member of his or her family shall have the right to the protection of the law against such interference or attacks.").

100. See Scheinin, *supra* note 99, at 6; see also European Convention, *supra* note 15, at art. 18; Cairo Declaration, *supra* note 97, at art. 8 (stating in language similar to the



national constitutions do not always explicitly mention privacy, but nearly all countries recognize its fundamental importance.<sup>101</sup>

Both regional and international tribunals have adjudicated cases involving the right to privacy. In 2008, the European Court of Human Rights (ECHR) unanimously ruled that Britain's DNA and fingerprint storing policy violated the right to privacy.<sup>102</sup> The case was brought by two men who had been arrested on separate occasions and ultimately released,<sup>103</sup> but whose DNA and fingerprints remained in the British database. The men requested that the samples be destroyed, but the police declined to do so.<sup>104</sup> In their submission to the ECHR, the applicants alleged that the DNA and fingerprint policy violated Article 8 of the [European] Convention on Human Rights and Fundamental Freedoms, which provides in relevant part, "[e]veryone has the right to respect for his private . . . life . . . . There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society . . . for the prevention of disorder or crime."<sup>105</sup> The Court ultimately found that the DNA and fingerprint retention policy failed to balance equally the state and individual interests at issue. It held that the retention constituted "a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary for a democratic society."<sup>106</sup>

The right to privacy also played a role in a 2007 case before the International Criminal Court (ICC),<sup>107</sup> in which the ICC addressed the right to privacy as related to searches and seizures of homes for criminal evidence.<sup>108</sup> Defendant Thomas Lubanga Dyilo argued that a search that violated the Congolese Code of Criminal Procedure amounted to an unlawful

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European Convention, "Everyone shall have the right to privacy in the conduct of his private affairs, in his home, among his family, with regard to his property and his relationships."). Negative rights require that states refrain from acting in a way that violates the rights of individuals, while positive rights require states to take action to protect the rights of individuals. See MASHOOD A. BADERIN & ROBERT MCCORQUODALE, *ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN ACTION* 13 (2007).

101. See Scheinin, *supra* note 99, at 6.

102. See *S. & Marper v. U.K.*, [2008] Eur. Ct. H.R., App. No. 30562/04; see also Sarah Lyall, *European Court Rules Against Britain's Policy of Keeping DNA Database of Suspects*, N.Y. TIMES, Dec. 4, 2008, at A16.

103. S. was acquitted, and the charges against Marper were dropped. See *S. & Marper*, [2008] Eur. Ct. H.R. at para. 10–11.

104. *Id.* at para. 12.

105. European Convention, *supra* note 15, at art. 8.

106. *S. & Marper*, [2008] Eur. Ct. H.R. at para. 125.

107. Interestingly, the Rome Statute of the International Criminal Court makes no mention of the right to privacy. See Andrew J. Walker, *When a Good Idea is Poorly Implemented: How the International Criminal Court Fails to be Insulated from International Politics and to Protect Basic Due Process Guarantees*, 106 W. VA. L. REV. 245, 278 (2004).

108. A 1997 case from the European Court of Human Rights stated that states may conduct searches and seizures of residences—clearly an interference in the right to privacy—to obtain evidence of a criminal offense. See *Camenzind v. Switz.*, [1997] Eur. Ct. H.R., App. No. 21353/93, at para. 45. An interference of this sort may be lawful, so long as the State action was "proportionate to the aim pursued." *Id.*

infringement of his right to privacy.<sup>109</sup> In this case, the Congolese police executed a search warrant of a home in the absence of the defendant and of the resident, in violation of national law.<sup>110</sup> The Pre-Trial Chamber acknowledged that the search contravened national law, but that the interference with the right of privacy was not “so serious to amount to a violation of the internationally recognized human right.”<sup>111</sup> The Chamber then proceeded to evaluate the search and seizure in light of the principle of proportionality, finding that the search was conducted in a manner disproportionate to the state’s interests.<sup>112</sup>

These two contexts illustrate the importance of the right to privacy in international law, and the limitations of its reach. Although care must be taken to keep personal information private when consent has not been granted, the right to privacy cannot necessarily be used to protect an individual from a criminal investigation. The DNA law raises both issues—the protection of personal information and a criminal investigation. The natural inquiry, then, involves the limits on the right to privacy.

#### B. Limits on the Right to Privacy

Despite the fundamental nature of the right to privacy, derogations under certain circumstances are permissible.<sup>113</sup> The ICCPR is one of the primary international human rights accords.<sup>114</sup> Article 17 addresses the right to privacy:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.<sup>115</sup>

Article 4 allows states parties to derogate from certain rights in the ICCPR, though only when there is an officially proclaimed state of emergency that threatens the nation.<sup>116</sup> If a state party elects to derogate from a provision of the Covenant, it must inform the other states parties, via the Secretary-General of the United Nations (UN).<sup>117</sup>

In 1988, the Human Rights Committee (HRC), a group of independent experts that issue authoritative interpretations of the ICCPR, released Gen-

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109. See *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, para. 72 (Pre-Trial Chamber I for the Int’l Crim. Ct. Jan. 29, 2007).

110. See *id.*

111. *Id.* at para. 78.

112. See *id.* at paras. 89-90.

113. See *id.* at para. 75.

114. See STEVEN R. RATNER & JASON S. ABRAMS, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY* 152 (2d ed. 2001).

115. ICCPR, *supra* note 15, at art. 17.

116. *Id.* at art. 4(1).

117. *Id.* at art. 4(3).

eral Comment 16 on the right to privacy (Art. 17).<sup>118</sup> In this General Comment, the HRC noted that the right to privacy is not absolute: "As all persons live in society, the protection of privacy is necessarily relative."<sup>119</sup>

Despite these guidelines on permissible derogations, "States have only rarely resorted to the acknowledged mechanisms available under international law in general, and the Covenant in particular, for unilateral exceptions to the right to privacy."<sup>120</sup> Thus, it appears that states parties are generally satisfied with the framework of Article 17.<sup>121</sup>

Other articles in the ICCPR include provisions for permissible limitations of the relevant right. For example, Article 21, regarding the right of peaceful assembly, provides:

No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.<sup>122</sup>

Other articles, such as 12 (freedom of movement), 18 (freedom of thought, conscience, and religion), 19 (freedom of expression), and 22 (freedom of association) include similar language.<sup>123</sup> Article 17, the right to privacy, notably does *not* contain this limiting language. In this situation, common sense treaty interpretation indicates that the omission of a limitations clause in Article 17 is purposeful and, in absence of specific language to the contrary, cannot be read to include such a clause inherently.<sup>124</sup> As such, it appears that the right to privacy is a protected right.<sup>125</sup>

Despite the difference in wording between Article 17 and the above-mentioned articles with limitations clauses, state practice suggests that states frequently make exceptions to privacy rights in certain contexts, such as a criminal investigation. The ICC has not treated the right to pri-

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118. See Human Rights Committee, General Comment 16, (Twenty-third session, 1988), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HR1/Gen/1/Rev.1 at 21 (1994).

119. *Id.*, at para. 7.

120. See Scheinin, *supra* note 99, at 7.

121. See *id.*

122. ICCPR, *supra* note 15, at art. 21.

123. *Id.* at arts. 12, 18, 19, 22.

124. The Vienna Convention on the Law of Treaties, which codifies international law on this subject, provides that treaty terms should be interpreted in accordance with their ordinary meaning. Vienna Convention on the Law of Treaties art. 31, *adopted* May 22, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

125. It should be noted, however, that the [European] Convention for the Protection of Human Rights and Fundamental Freedoms *does* contain a limitations clause with regard to the right to privacy. Article 8(2) states that, "[t]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." European Convention, *supra* note 15.

vacy as an absolute right from which no derogations are permitted.<sup>126</sup> For example, in the *Lubanga* case, after determining that there was no serious violation of international human rights, the Court evaluated whether the principle of proportionality was violated when Congolese national authorities searched a private home and seized hundreds of documents for the purpose of a domestic criminal investigation.<sup>127</sup> Citing precedent from the European Court of Human Rights,<sup>128</sup> the Court found that the search was indiscriminate and not proportionate to the objectives of the national authorities. Nevertheless, it balanced the seriousness of the violation against the fairness of the trial as a whole and admitted the evidence.<sup>129</sup>

Likewise, in *S. and Marper v. U.K.*, the European Court of Human Rights also engaged in a balancing test between state and individual interests in the context of the retention of DNA fingerprint samples of unconvicted persons. The Court found that the applicants' right to privacy had been violated by Britain's retention policy.<sup>130</sup> The right to privacy may be a fundamental right, but limited derogations are permitted, and any derogation or limitation on the right to privacy must be proportionate to the government interest at issue. In the instant case, the compulsory extraction of DNA from an innocent person is balanced against the government's interest in establishing the truth and prosecuting suspects of crimes committed during the military dictatorship.

As stated above, the right to privacy is not absolute. In the criminal context, the right to privacy can—and often does—conflict with state interests that may be sufficient to render the derogation of the right legitimate. In this context, “the individual right to privacy is balanced against a societal interest in which that same individual is assumed to have a stake.”<sup>131</sup> When privacy is viewed this way, the individual right often loses to the societal right.<sup>132</sup> Thus, an examination of the nature of the societal right, the right to truth, is the logical next step in this analysis.

#### IV. The Right to the Truth

During the dictatorship in Argentina, as in many other countries in

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126. See *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, para. 81 (Pre-Trial Chamber I for the Int'l Crim. Ct. Jan. 29, 2007).

127. *Id.*

128. *Id.* at paras. 79–81 (citing *Mialhe v. France*, Judgment of 25 February 1993, Application No. 12661/87, para. 39).

129. *Id.* at paras. 89–90. The ICCPR echoes this balancing test, stating that an interference with the right to personal integrity “is permissible only when it transpires in accordance with the national legal system under non-arbitrary circumstances,” that is, when it serves a legitimate governmental purpose and respects proportionality. MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 295 (1993).

130. See *S. & Marper v. U.K.*, [2008] Eur. Ct. H.R., App. No. 30562/04, at para. 125.

131. PRISCILLA M. REGAN, LEGISLATING PRIVACY: TECHNOLOGY, SOCIAL VALUES, AND PUBLIC POLICY 213 (1995) (reissued July 1, 2009).

132. See Newman, *supra* note 89, at 319.

the world,<sup>133</sup> disappearance was a deliberate tactic of oppression. Disappearance is an effective tool for a regime because once a person disappears, there is no information available about what happened; the power of disappearance lies in the unknown. The authorities maintain ignorance, and thus, the family members of the disappeared are left to choose between believing that the victim is still alive or mourning a loss.<sup>134</sup> As such, the Inter-American Court has characterized enforced disappearance as a “continuous violation of many rights under the [American Convention on Human Rights] that State Parties are obligated to respect and guarantee.”<sup>135</sup> Likewise, the European Court of Human Rights has declared enforced disappearance to be a continuing offense.<sup>136</sup> Through a review of the development and codification of the right to truth, one can see how the right to truth emerges to combat the unknown that results from a campaign of disappearance.

#### A. Definition and Development of the Right

According to a UN Economic and Social Council (ECOSOC) study, “[t]he right to the truth implies knowing the full and complete truth as to the events that transpired, their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place, as well as the reasons for them.”<sup>137</sup> It is a procedural right that becomes relevant after the commission of a human rights violation where the authorities fail to provide information about the first viola-

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133. Countries as different as Chechnya, Chile, and Pakistan have all practiced disappearance. See generally Joseph Barrett, *Chechnya's Last Hope? Enforced Disappearances and the European Court of Human Rights*, 22 HARV. HUM. RTS. J. 133 (2009) (discussing enforced disappearances in Chechnya); David Scheffer, *Atrocity Crimes Framing the Responsibility to Protect*, 40 CASE W. RES. J. INT'L L. 111 (2008) (discussing enforced disappearances in Chile); AMNESTY INTERNATIONAL, DENYING THE UNDENIABLE: ENFORCED DISAPPEARANCES IN PAKISTAN (2008), available at [http://www.amnesty.org/en/library/asset/ASA33/018/2008/en/0de43038-57dd-11dd-be62-3f7ba2157024/asa330182008\\_eng.pdf](http://www.amnesty.org/en/library/asset/ASA33/018/2008/en/0de43038-57dd-11dd-be62-3f7ba2157024/asa330182008_eng.pdf) (discussing enforced disappearances in Pakistan).

134. According to the International Convention for the Protection of All Persons from Enforced Disappearance, “enforced disappearance” means “the arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.” International Convention for the Protection of All Persons from Enforced Disappearance art. 2, adopted Dec. 20, 2006, 61 U.N.T.S. 488 (entered into force Dec. 23, 2010) (emphasis added).

135. Velásquez Rodríguez v. Honduras, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (ser. C) No. 4, para. 155 (1988).

136. See Cyprus v. Turkey, [2001] Eur. Ct. H.R., App. No. 25781/94, at para. 151. The reasons behind characterizing disappearance as a continuous crime are twofold: (1) the fate of the person is still unknown, and (2) the family members' pain and suffering at not knowing the fate of the disappeared person continues until information is provided. See generally, Petra Dijkstra, et al., *Enforced Disappearances as Continuing Violations*, AMSTERDAM INTERNATIONAL LAW CLINIC (2002).

137. Econ. & Soc. Council, Comm'n on Human Rights, *Promotion and Protection of Human Rights: Study on the Right to the Truth*, at 4, U.N. Doc. E/CN.4/2006/91 (Feb. 8, 2006) [hereinafter ECOSOC].

tion.<sup>138</sup> The family of a disappeared person has the right, therefore, to know what happened to its loved one. Knowledge, at least in theory, will lead to the possibility of closure, a restoration of dignity, and the prospect of reparations and redress.<sup>139</sup>

The Inter-American human rights system, which has established substantial jurisprudence in this area,<sup>140</sup> has found the right to truth to be enshrined in Article 25 (right to judicial protection), Article 1(1) (obligation to respect rights), Article 8 (right to a fair trial), and Article 13 (freedom of thought and expression) of the American Convention on Human Rights.<sup>141</sup> The Inter-American Court has situated the right to truth within this broader context, and, as a result, “the court ensures not only the right to truth but the right to justice”<sup>142</sup> because it imposes a duty on the state to investigate, prosecute, and punish human rights abuses.<sup>143</sup> The essence of the right to truth is knowledge in the face of secrecy, the triumph of disclosure over impunity.

Although generally associated with enforced disappearances, the right to truth can trace its origins back to international humanitarian law, and the Additional Protocol I to the Geneva Conventions.<sup>144</sup> Articles 32 and 33 of Additional Protocol I assert that families have the right to know the fate of their relatives,<sup>145</sup> and spell out the duty to search for missing persons and to report on their findings.<sup>146</sup> Today, however, the right to truth is

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138. See Yasmin Naqvi, *The Right to the Truth in International Law: Fact or Fiction?*, 88 INT’L REV. RED CROSS 245, 249 (2006).

139. See *id.*

140. See Morgane Landel, *Proposals for a Truth Commission and Reparations Program for Victims of Torture By US Forces Since 9/11*, 16 ILSA J. INT’L & COMP. L. 115, 120 (2009).

141. See, e.g., cases 11.505, 11.532, 11.541, 11.546, 11.549, 11.569, 11.572, 11.573, 11.583, 11.595, 11.657, 11.705 v. Chile, Alfonso René Chanfeau Orayce, Inter-Am. Comm’n H.R., Report No. 25/98, OEA/Ser.L./V/II.95, doc. 7 rev. at 512 (1997).

142. Dermot Groome, *The Right to Truth in the Fight Against Impunity*, 29 BERKELEY J. INT’L L. 175, 184 (2011).

143. See Velásquez Rodríguez v. Honduras, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (ser. C) No. 4, para. 174-76 (1988).

144. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1979) [hereinafter Protocol I]; see also ECOSOC, *supra* note 137, at 6.

145. Article 32 of the Additional Protocol I to the Geneva Conventions states, “In the implementation of this Section, the activities of the High Contracting Parties, of the Parties to the conflict and of the international humanitarian organizations mentioned in the Conventions and in this Protocol shall be prompted mainly by the right of families to know the fate of their relatives.” Protocol I, *supra* note 144, at art. 32.

146. Article 33 states, in part:

1. As soon as circumstances permit, and at the latest from the end of active hostilities, each Party to the conflict shall search for the persons who have been reported missing by an adverse Party. Such adverse Party shall transmit all relevant information concerning such persons in order to facilitate such searches.
2. In order to facilitate the gathering of information pursuant to the preceding paragraph, each Party to the conflict shall, with respect to persons who would not receive more favourable consideration under the Conventions and this Protocol:

linked most often to transitional justice situations involving widespread enforced disappearance, though it has been extended to cover other serious violations of human rights, including extrajudicial execution and torture.<sup>147</sup>

Many of these transitional justice situations are the result of the climate of impunity for human rights abuses during authoritarian regimes in Latin America during the 1980s and 1990s. The right to truth emerged, in part, as a response to the widespread practice of enforced disappearances, and garnered the attention of several human rights groups, including the UN Working Group on Enforced Involuntary Disappearances (WGEID), the UN Human Rights Committee, and the Inter-American Commission on Human Rights.<sup>148</sup>

The landmark *Velásquez-Rodríguez* case in 1988 set the legal foundation for the right to truth.<sup>149</sup> In this case, the Inter-American Court concluded that states have a duty to promote and protect rights, and to investigate, and punish abuses.<sup>150</sup> As the number of groups making recommendations or issuing reports about the right to the truth increased, the more surefooted the *Velásquez-Rodríguez* holding became in the catalogue of international human rights.

While the right to the truth initially encompassed the right to know the fate and whereabouts of disappeared persons, as the scope of the right has evolved, so too have the components contained therein. The UN High Commissioner for Human Rights contends that the right to truth involves:

the entitlement to seek and obtain information on: the causes leading to the person's victimization; the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law; the progress and results of the investigation; the circumstances and reasons for the perpetration of crimes under international law and gross human rights violations; the circumstances in which violations took place; in the event of death, missing or enforced disappearance, the fate and whereabouts of the victims; and the identity of the perpetrators.<sup>151</sup>

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(a) record the information specified in Article 138 of the Fourth Convention in respect of such persons who have been detained, imprisoned or otherwise held in captivity for more than two weeks as a result of hostilities or occupation, or who have died during any period of detention;

(b) to the fullest extent possible, facilitate and, if need be, carry out the search for and the recording of information concerning such persons if they have died in other circumstances as a result of hostilities or occupation.

*Id.* at art. 33.

147. ECOSOC, *supra* note 137, at 5.

148. See Francesca Lessa, *The Enforcement of the Right to Truth in National Practice: Non-Judicial Alternatives to Prosecution in Argentina and Uruguay* 4 (Mar. 27, 2008) (unpublished Ph.D. paper, London School of Economics).

149. See *Velásquez-Rodríguez v. Honduras*, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (ser. C) No. 4, para. 166 (1988).

150. *Id.* at paras. 174-76.

151. ECOSOC, *supra* note 137, at 11.

The Committee of the Red Cross has gone further, stating that the right to truth is a norm of customary international law.<sup>152</sup>

It is critical to note, however, that thus far, all courts, as well as national and international bodies, that have discussed the right to truth have involved a two-party scenario: the families of the disappeared and the governments who allegedly caused the disappearances. By contrast, the Argentine context has three distinct parties: the parents of the victims of enforced disappearance, the children who may have been born to disappeared parents, and the government. In fact, much of the push for the DNA law came from the Abuelas, not the government. Thus, it is unclear whether the same interpretations of the various human rights conventions would apply in such three-party cases.

## B. Codification

In 2005, the International Convention for the Protection of All Persons from Enforced Disappearance explicitly codified the right to truth for the first time.<sup>153</sup> Article 24(2) of the Convention provides that “[e]ach victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.”<sup>154</sup> One month after Iraq became the twentieth state to ratify the treaty on December 23, 2010, the Convention entered into force.<sup>155</sup> This explicit codification contrasts with the way the right to truth has been recognized in other human rights instruments.

Despite the recent, explicit acknowledgment of the right to truth in the Enforced Disappearance Convention, the right has been alluded to at the regional and international level for years, usually through provisions requiring states to inform relatives of the fate and whereabouts of victims.<sup>156</sup> Moreover, the High Commissioner for Human Rights has stated that the right is linked to the right to seek, receive, and impart information,<sup>157</sup> as codified in Article 19 of the UDHR.<sup>158</sup> The African Charter on Human and Peoples’ Rights contains a similar article that provides for “the right to receive information.”<sup>159</sup> The ICCPR contains no explicit right to truth, but the right has been invoked in relation to Article 23, which guar-

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152. See INTERNATIONAL COMMITTEE OF THE RED CROSS, ET AL., *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* Vol. 1, 421 (Cambridge University Press 2005).

153. See generally International Convention for the Protection of All Persons From Enforced Disappearance, *supra* note 134.

154. *Id.* at art. 24(2).

155. See Int’l Fed’n for Human Rights (FIDH), *The International Convention for the Protection of All Persons from Enforced Disappearances Enters into Force on 23 December 2010* (Nov. 26, 2010), <http://www.fidh.org/The-International-Convention-for-the-Protection>.

156. See Org. of Am. States, Preliminary Draft Additional Protocol to the American Convention on Human Rights (Pact of San Jose), AG/RES. 666 (XIII-O/83), para. 5 (Nov. 18, 1983); see also AG/RES. 742 (XIV-O/84), para. 5 (Nov. 17, 1984).

157. See ECOSOC, *supra* note 137, at 11.

158. UDHR, *supra* note 87, at art. 19; see also HAYNER, *supra* note 83, at 31.

159. Banjul Charter, *supra* note 98, at art. 9.



antees protection of the family.<sup>160</sup> Similarly, the Convention on the Rights of the Child has been said to contain an implicit right to truth in its provisions on the right of a child not to be separated from his or her parents<sup>161</sup> and the right to the preservation of identity.<sup>162</sup>

The Inter-American Court has addressed the issue of the right to truth on several occasions. It has repeatedly recognized the right of relatives to learn the fate and whereabouts of their loved ones,<sup>163</sup> though notably not in the context of a conflict with other rights. In addition, the Inter-American Court has connected the right to truth with the right to obtain an explanation of the facts of a human rights violation and the responsibility of the State: through Article 8 of the American Convention on Human Rights, the right to a hearing by a competent, independent, and impartial tribunal, and through Article 25, the right to an effective remedy.<sup>164</sup> Furthermore, the Inter-American Court has opined that the right to truth is not limited to cases of enforced disappearances, but that it applies to all gross human rights violations.<sup>165</sup>

More recently, since 2005, the Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity has included the right to the truth, stating:

Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations.<sup>166</sup>

On the domestic level, Argentina explicitly recognized the right to truth in 2005.<sup>167</sup> So too has the Human Rights Chamber for Bosnia and Herzegovina, which has based the right to truth on provisions in the European Convention on Human Rights.<sup>168</sup> In particular, the Chamber noted that the right is associated with the Convention's right to be free from torture and ill treatment, as well as the right to family life, and the State's obligation to investigate violations of the Convention.<sup>169</sup> In the cases

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160. See ICCPR, *supra* note 15, at art. 23.

161. See CRC, *supra* note 15, at art. 9.

162. *Id.* at art. 8.

163. See Velásquez-Rodríguez v. Honduras, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (ser. C) No. 4, para. 181 (1988).

164. See *id.*; see also Blake Case, Judgment of Jan. 24, 1998, Inter-Am. Ct. H.R. (ser. C) No. 36, para. 97 (1998).

165. See Tibi v. Ecuador, Judgment of Sept. 7, 2004, Inter-Am. Ct. H.R. (ser. C) No. 114 (2004).

166. Econ. & Soc. Council, Comm'n on Human Rights, *Promotion and Protection of Human Rights: Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, Principle 2, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005).

167. See Agreement of 1 September 2003 of the National Chamber for Federal Criminal and Correctional Matters, *Caso Suárez Mason*, Rol. 450 and *Caso Escuela Mecánica de la Armada*, Rol. 761.

168. See Palic v. Republika Srpska, Case No. CH/99/3196, Decision on Admissibility and Merits (Jan. 11, 2001).

169. *Id.*

regarding the massacre at Srebrenica, the Human Rights Chamber “found that the failure of Republika Srpska authorities ‘to inform the applicants about the truth of the fate and whereabouts of their missing loved ones’ including their failure to conduct a ‘meaningful and effective investigation into the massacre,’ violated Article 3 of the European Convention.”<sup>170</sup>

This level of codification, while not as ingrained in international human rights law as the right to privacy, is indicative of the right-to-truth’s status as a fundamental human right. It has progressed from being implied through the exercise of other human rights to being mentioned explicitly both in the Enforced Disappearance Convention and the Updated Set of Principles. The increasing prominence of the right to truth obligates states to enforce it. Nevertheless, the question remains how a state can fulfill the requirement that it protect this right while simultaneously confronted with another fundamental right.

## V. Resolving the Conflict of Rights?

The Argentine DNA law clearly pits the right to privacy against the right to truth. It favors truth at the expense of privacy, leaving the adult child with the choice of providing a DNA sample or waiting for the police to come to his or her house with a search warrant to seize personal items.<sup>171</sup> Is this outcome legitimate under international human rights law?

To undertake this inquiry, one must explore the relationship between the rights and the rights-holders, as well as the goals and concerns of the interested parties. Then, an analysis of human rights law and state practice leads to the conclusion that it is unclear whether truth or privacy should prevail. In these indeterminate situations, international law dictates that states should not be restricted from acting.<sup>172</sup> Argentina, then, is left to use its judgment to determine whether to favor one right over another. But the finding that the DNA law may legitimately favor truth over privacy does not mean it is the optimal path for Argentina’s efforts to target raising parents who acted illegally. There are other solutions to the truth versus privacy conundrum of the Argentine DNA law that may maximize the satisfaction of all parties involved.

### A. Who are the Rights-Holders?

Most human rights, such as the right to privacy, are individual rights owed to each person by virtue of his or her status as a human being. The right to truth, however, is widely considered to be both an individual and a societal right.<sup>173</sup> The idea is that both the victims and their family mem-

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170. ECOSOC, *supra* note 137, at para. 24 (quoting Srebrenica Cases, Cases Nos. CH/01/8365 et al., para. 220(4) (Mar. 2003)). Article 3 of the European Convention for Human Rights is the prohibition on torture. See European Convention, *supra* note 15.

171. See DNA law, *supra* note 7, at para. 4; see also Mayra Pertossi, *Argentina Forces Dirty War Orphans to Provide DNA*, ASSOCIATED PRESS, Nov. 21, 2009, available at <http://www.geneticsandsociety.org/article.php?id=4991>.

172. *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

173. See Lessa, *supra* note 148, at 6.

bers hold the right, as does society in search of the truth.<sup>174</sup> In the Argentine context, the societal right is the right to know the truth of the events that transpired at the hands of the government. As one scholar writes:

For victims and family, the right entails an obligation for the state to provide specific information about the circumstances in which the serious violation of the victim's human rights occurred, as well as the fate of the victim. For society in general, the right to the truth imposes an obligation on the state to disclose information about the circumstances and reasons that led to 'massive or systematic violations,' and to do so by taking appropriate action, which may include non-judicial measures.<sup>175</sup>

Thus, both the individual and the society are the holders of the right to the truth.<sup>176</sup> This collective right conflicts with the individual privacy right in the Argentine DNA law, insofar as the law leaves no opt-out provision for the individual in the event that he or she does not want to provide a DNA sample.<sup>177</sup> This result, however, is in concert with the notion that, "[b]ecause the individual is a lesser part of the social whole which will presumably benefit from disclosure, the individual will almost always lose."<sup>178</sup> In the instant case, despite the fact that the adult child prefers to exercise his or her right to privacy, society views disclosure of the truth to be beneficial to everyone, including the adult child.

The issues and concerns at stake in this situation cannot be minimized; they relate to the fundamental themes of identity and family. The adult children, who wish to remain anonymous, want to retain their privacy—they do not want their biological identity investigated.<sup>179</sup> Society, however, wants confirmation of the biological identity in order to establish the truth and, perhaps, to punish the adult children's parents if they are found to have knowingly adopted their children illegally. Yet, the adult child is also a holder of the right to truth, but he or she may not want to exercise this right affirmatively. The adult child may not want the truth to be made known.

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174. See *id.*

175. Naqvi, *supra* note 138, at 260.

176. One may question whether the Abuelas are leveraging a societal right for their own private interests. That is, does the right to truth actually require biological identification? The right, however, is widely seen as encompassing the right to know the fate of the victim. In this case, the victim is the child who was disappeared or born in detention. Short of a full admission by the raising parents as to the origins of their illegally adopted child, biological identification seems to be the only way to determine the fate of this victim.

177. It can hardly be said that having a court order police to enter one's home to search for personal items containing DNA is an opt-out provision for the individual who prefers not to provide a sample.

178. Newman, *supra* note 89, at 318.

179. There are several reasons why the children of the disappeared might want to maintain their privacy. In so doing, some may feel as if they are protecting their raising parents from criminal prosecution. Those who never knew they were adopted may wish to remain ignorant of this possibility. Also, as in many cases of adopted children in general, some children of the disappeared may not want their biological families to know their identity; they view their raising parents as their families and have long-established ties with them. Turning to their biological families may seem disloyal.

The parties' desired end result plays a key role in deriving a more optimal solution to the DNA law's one-sidedness. It is important to note that the Abuelas no longer seek restitution of the child nor return of the stolen child to his or her biological family.<sup>180</sup> Instead, given the passage of time, the Abuelas have pushed for restoration of the adult child's identity and knowledge of his or her origins.<sup>181</sup> The adult children, on the other hand, simply want, as Justice Brandeis famously wrote, "the right to be left alone."<sup>182</sup> They are also, understandably, concerned about having a role—forced or voluntary—in a trial against the parents who raised them.<sup>183</sup> Regardless of the adult children's biological origins, a DNA test feels to some of them like betrayal.<sup>184</sup> International human rights law can provide some insight into this complicated relationship between truth and privacy, but the final determination of the order of rights lies with the Argentine government.

B. Does One Right Trump the Other Under International Human Rights Law?

Despite attempts to argue to the contrary, there is no agreed-upon hierarchy of human rights.<sup>185</sup> A brief inspection of several human rights instruments finds that "human rights," "freedoms," "fundamental human rights," "fundamental freedoms," "rights and freedoms," and "human rights and fundamental freedoms" are often used interchangeably.<sup>186</sup> Some rights are considered fundamental to human dignity, but there is no agreement on what makes a right fundamental in nature.<sup>187</sup>

The absence of a hierarchy, thus, puts truth and privacy on equal footing, at least in theory. Upon closer inspection, however, it is possible to evaluate the legitimacy of the Argentine DNA law. The first step in this process is to take a closer look at the rights and any permissible limitations included therein. The next step is to examine the practice of states and their attitudes towards the rights in question.

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180. See Oren, *supra* note 35, at 193-94.

181. See *id.*

182. *Olmstead v. United States*, 277 U.S. 438, 478 (1928).

183. The fact that nearly thirty years have passed since the dictatorship lost power certainly affects the adult children's idea of who their families are. Interestingly, the Human Rights Committee in 1980 rejected the communication of a Polish woman who, after having lived in Canada for seventeen years, requested entry visas for her daughter and grandson. The Committee noted that, after seventeen years of being apart, "a family could not be said to have existed," and that "the State was not obligated to re-establish conditions of family life already impaired by way of positive measures." NOWAK, *supra* note 129, at 300-01 (citing Human Rights Comm., *A.S. v. Canada*, Communication No. 68/1980, para. 5.1, U.N. Doc. CCPR/C/OP/, at 27 (1984)); see generally Oren, *supra* note 35.

184. See Gashe, *supra* note 11.

185. See Kristin N. Wuerffel, *Discrimination Among Rights? A Nation's Legislating a Hierarchy of Human Rights in the Context of International Human Rights Customary Law*, 33 VAL. U. L. REV. 369, 399 (1998).

186. Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1, 5 (1986).

187. See Wuerffel, *supra* note 185, at 397.

Some scholars argue that the right to truth is nonderogable,<sup>188</sup> but the issue is far from settled, and no limitations questions have yet arisen. The right to privacy, as found in Article 17 of the ICCPR, contains no explicit limitations clause, in contrast to several other rights contained in the convention. Although some scholars or practitioners might try to read limitations into the right to privacy,<sup>189</sup> basic statutory interpretation leads to the conclusions that this omission was deliberate. As such, like the right to truth, Article 17 of the ICCPR should be read to lack permissible limitations. Nevertheless, the Argentine DNA law, as written, limits the right to privacy of the individuals who do not want their DNA tested or genetic information revealed.

State practice with regard to the rights at issue seems to contradict the notion that these rights cannot be limited. The right to truth may be too new to provide a clear view of state practice, but the fact that the Inter-American Court has heard cases involving the right to truth indicates that at least some states feel that there are legitimate reasons to withhold truth. Likewise, state practice with regard to the right to privacy reveals that states frequently limit privacy: for example in criminal investigations, heightened airport security, and in schools. Moreover, in a post-9/11 world, states may claim that national security concerns allow them to limit human rights.<sup>190</sup> Despite the fact that the rights as codified do not contain limitations, state practice demonstrates the contrary.

It appears that the rights to privacy and truth may have equal standing, but this conclusion is hardly clear. The international legal authorities do not address the three-party situation that exists in Argentina between the grandparents, adult children, and the government. Moreover, treaty interpretation suggests that privacy rights are particularly protected, though this protection is difficult to reconcile with state practices limiting it.

In such a murky situation, perhaps international human rights law offers more questions than solutions. On the face, it appears that international human rights law can help evaluate the DNA law, but there really is little law directly on point, and state practice is inconclusive at best. It is important to remember that international law, in any of its forms, is neither perfect nor comprehensive; not all possible situations are covered by existing international law. In this circumstance, the *Lotus* case from the Permanent Court for International Justice dictates the next step.<sup>191</sup> Under

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188. See Naqvi, *supra* note 138, at 265; see also ECOSOC, *supra* note 137, at 2.

189. See, e.g., Scheinin, *supra* note 99.

190. See Thérèse Murphy & Noel Whitty, *Is Human Rights Prepared? Risk, Rights and Public Health Emergencies*, 17 MED. L. REV. 219, 234 (2009); see also Penny Andrews, *Sixty Years On: The International Human Rights Movement Today*, 24 MD. J. INT'L L. 47, 50 (2009).

191. See *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7). In the *Lotus* case, the French ship *Lotus* collided with the Turkish ship *Boz-Kourt* in 1926, and, after aiding the Turkish survivors and transporting them to Constantinople, the officer on watch at the time of the collision was arrested for manslaughter. The question before the PCIJ was whether Turkey had violated international law by instituting "criminal pro-

*Lotus*, in the absence of a rule of international law prohibiting conduct, the state may act.<sup>192</sup> Thus, the issue—in this case the clash of rights implicated in Argentina's DNA law—should be left to the judgment of the state. The question then becomes whether Argentina's judgment was sound in this instance.

### C. Does a More Optimal Solution to the Argentine DNA Law Conflict of Rights Exist?

Even though an analysis of the relevant rights under international human rights law is unclear, with the result that Argentina may choose truth over privacy, there may be other solutions that could appease the interested parties. One possible solution is the imposition of substitute criminal charges in the event that the raising parents are found to have acted knowingly and illegally. The other possible solution, and the one I argue is optimal, is to offer the raising parents amnesty in exchange for the truth. Both of these situations address the Abuelas' desire for truth and the adult children's desire for privacy regarding their DNA.<sup>193</sup>

#### 1. *Substitute Charges*

Given that there are adult children who prefer not to provide a DNA sample or have one otherwise taken from them by the police, one must think of a solution that makes the adult children more likely to agree to a DNA test when requested by a court. One way to do this would be to ease the fear that, by providing DNA, the adult children are sending the parents who raised them to jail. If a DNA test proves that the adult child was not raised by his biological parents *and* if the state can prove that the raising parents knowingly adopted the child illegally, the result may include a jail term.<sup>194</sup> Bringing substitute charges that do not involve jail time, however, could relieve some of the burden from the adult children about the consequences of their actions.

Substitute charges mean that the raising parents would be charged, not with illegal adoption or falsification of registration papers, for example, but with lesser charges, such as impeding an investigation.<sup>195</sup> Serbia, for instance, indicted former President of Serbia and Former Republic of Yugoslavia, Slobodan Milosevic, on charges of corruption and political assassi-

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ceedings in pursuance of Turkish law" against the French officer. *Id.* at 5. The Court articulated in dicta what has become known as the *Lotus* principle: "Restrictions upon states cannot be presumed," and held that unless France could point to a rule prohibiting Turkey's conduct, there was no violation of international law. *Id.* at 30–31.

192. See *id.* at 18.

193. Neither solution fully addresses the adult children's interest in not learning their biological origins, but both solutions represent improvements over the current law, which completely disregards the privacy interests of the adult child.

194. See *Dirty War Adoption Couple Jailed*, BBC NEWS (Apr. 4, 2008), <http://news.bbc.co.uk/2/hi/americas/7331857.stm>; see also *Cry Argentina, Dirty War Babies Jail Foster Parents*, REUTERS (Apr. 23, 2005), available at <http://www.expressindia.com/news/fullstory.php?newsid=45357>.

195. See Ivan Simonovic, *Attitudes and Types of Reaction Toward Past War Crimes and Human Rights Abuses*, 29 YALE J. INT'L L. 343, 349 (2004).

nation, rather than for genocide and war crimes.<sup>196</sup> In the Argentine case, the use of substitute criminal charges could encourage reluctant adult children to come forward and submit to a DNA test at the court's request, as opposed to being forced to do so by the court's order. The adult children would be giving up their privacy voluntarily, and at the same time, the identification of the adult child's biological origins would be revealed, appeasing the Abuelas' desire for truth.

The problems with substitute charges, however, are twofold. First, knowing that any charges—even lesser charges—will be imposed may prevent the adult children from complying with a court order requiring DNA testing. Second, the use of substitute charges risks creating a false historical record.<sup>197</sup> The truth may come out in the media, but the court record will not accurately reflect the crimes committed by the raising parents.

## 2. *Amnesty for Voluntary Information from Raising Parents*

A second option addresses both shortcomings of substitute charges. If the Abuelas are sincere in their stated goal of restitution of identity and biological origins,<sup>198</sup> offering amnesty in exchange for information to the raising parents could result in a workable solution for both the biological families and the adult children. To be successful, an amnesty-for-information initiative would need to require that the raising parents provide a full accounting of the facts surrounding the adoption. The information provided would create an accurate historical record and serve the goals of the Abuelas.

With the burden on the raising parents to provide information, some adult children whose biological parentage was clarified would, in some instances, not need to provide DNA, thereby preserving the adult child's right to privacy. In the event that the raising parents' testimony does not allow for conclusions about the adult child's biological origins, the adult child, armed with the information that he or she has a biological family, might opt to take the DNA test, thereby, providing the Abuelas—and society—with information about his or her biological origins.

A similar initiative was put in place in South Africa in 1994, after the post-apartheid government came to power.<sup>199</sup> The requirements in that case were that the amnesty-seeker tell everything in his or her knowledge and show that the crimes were politically motivated.<sup>200</sup> If Argentina were to implement such an initiative, as in South Africa, "[a] grant of amnesty would be the carrot to get perpetrators' cooperation in the process, and the threat of prosecution would be the stick."<sup>201</sup>

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196. *See id.*

197. By nature of the judicial process, of course, a trial transcript can only provide an imperfect historical record.

198. *See Oren, supra* note 35, at 193-94.

199. *See HAYNER, supra* note 83, at 99.

200. *Id.*

201. *Id.* (citation omitted.)

The dual quest for truth while maintaining privacy does not have to result in the exclusion of one right in favor of the other. Although the momentum over the past twenty years has been prosecution-focused, other options do exist.<sup>202</sup> Argentina has a legitimate desire to learn the truth about the children stolen during the dictatorship, just as the adult children suspected to have been stolen have a legitimate desire for privacy regarding their biological origins. Exploring options other than criminal trials may result in a solution that respects both the right to truth and the right to privacy.

#### D. Beyond Argentina: A Framework for the Future

By all accounts, the situation in Argentina resulting in the efforts to identify adults who were illegally adopted as children and whose biological parents were victims of a regime that disappeared them seems unique. The reality, unfortunately, is that similar situations will occur in the future, and countries wrestling with these issues will look to the Argentine experience for guidance and ideas. A framework to assist countries in deciding the best avenue to pursue should evaluate several factors: first and foremost, the age of the person whose identity is in question; second, under what circumstances the child came to live with the raising family; and third, the goals and capacity of the country.

As a threshold matter, the age of the individual in question should be addressed first and be afforded the most weight. A child has a lesser expectation of privacy than an adult, and the methods pursued to identify the biological origins of an individual should vary depending on the age of that individual. Where biological information is sought about minors, the Convention on the Rights of the Child applies, and the best-interest-of-the-child standard applies.<sup>203</sup> In these situations, the best interest of the child may involve compulsory DNA testing and a return to the child's biological family. The older the child, however, the more difficult it becomes to remove him from the raising family and to place him in a home with his biological family, whom he may never have met. As children grow up, their right to privacy increases as they rely less and less on other adults to make decisions on their behalf.

Once individuals reach the legal age of maturity, the Convention on the Rights of the Child ceases to apply, and the adult is afforded the full right to privacy.<sup>204</sup> At that point, the adult should have a voice in the debate about how to proceed in a situation; for example, where prosecutors want to pursue rape charges against an alleged war criminal and need to prove a biological relationship between the suspect and the now-adult child. If that adult is reluctant to undergo DNA testing, then amnesty in

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202. See generally HAYNER, *supra* note 83, at 250–54.

203. CRC, *supra* note 15, at art. 3 (“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”).

204. *Id.* at art. 1.



exchange for an accounting of the facts or the imposition of other criminal charges will better satisfy both the biological family's need for truth and the privacy of the individual in question.<sup>205</sup> An adult not under suspicion of committing a crime should never be forced to undergo compulsory DNA testing. Such a requirement, which is contained in the Argentine DNA law,<sup>206</sup> prevents the adult from exercising her right to privacy at all, and favors the right to truth to the exclusion of the right to privacy.

Once the age question is addressed, the next step is to examine the options for countries wishing to identify the biological identity of individuals who may have been adopted illegally. DNA testing is certainly one option, though the imposition of substitute criminal charges, a grant of amnesty in exchange for an accounting of the facts, or even the establishment of a truth commission are also viable, and perhaps better, mechanisms, depending on whether the political will favors truth or prosecution.

In the case where the raising parents are innocent of any wrongdoing regarding the manner in which the child came to the family, a truth commission and voluntary DNA testing are the best options. The truth commission will provide the historical record, and the voluntary DNA testing will provide the evidence and data should the child want to seek out his or her biological family. This is the easier case, however; when the raising parents are suspected of engaging in illegal behavior, the situation is more complicated.

Assuming that the raising parent (or parents) is suspected of wrongdoing, the focus turns to the goals of the country grappling with these issues. Where prosecution is the goal, a country will look to DNA testing and the imposition of substitute criminal charges. If the goal is the establishment of the truth, however, a country will be better served by an initiative granting amnesty in return for an accounting of the facts, or a truth commission with no amnesty component.

In a situation where a country's political will leans toward the prosecution of suspects, the results of mandatory DNA testing will be an aid in achieving that goal, while also providing a judicial historical record.<sup>207</sup> A country pursuing this option, however, must make sure that it also has the capacity to test and to store the DNA securely. If that capacity does not exist at the national level, resort to international assistance can shore up the legitimacy of the process. Whether the genetic data is housed as part of a domestic, hybrid, or international initiative, it will allow a country to know the biological identity of an individual with the certainty of DNA evidence.

If mandatory DNA testing is not an option, for whatever reason, a country pursuing prosecution could impose a combination of substitute

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205. This scenario differs from the Argentine situation in that the adult child will have no reason to protect the rapist, though he may have an interest in protecting his mother from the often deeply ingrained social prejudice against rape victims.

206. See DNA law, *supra* note 7.

207. This article assumes that the biological identification is necessary for the prosecution.

criminal charges and voluntary DNA testing. The DNA results would assist prosecutors in making their case, while the substitute criminal charges would ease the burden that might be felt by the child or adult who is providing information that could be detrimental to his or her raising parents. The downside of substitute criminal charges, however, is that the historical record, at least as provided by the courts, will not reflect the gravity of the situation. There may also exist a lack of political will on the part of the population to impose a criminal sanction other than the one called for by the crime committed. To some countries, however, the simple fact that people were found guilty—of something—will be enough to satisfy the desire for prosecution.

When the goal of the populace leans toward the establishment of truth more than the establishment of guilt, truth commissions or amnesties in exchange for facts will better serve this goal than mandatory DNA testing or substitute criminal charges. Offering amnesty to people who give a full accounting of the facts allows for the truth to come to light while shielding the guilty parties from prosecution. It must be remembered, however, that prosecution remains an option in this situation, should the suspects not provide the requisite information. In South Africa, for example, if those seeking amnesty could not prove that their crimes were politically motivated—a requirement for the South African Truth and Reconciliation Commission—they were subject to criminal prosecution.<sup>208</sup>

A truth commission, established solely to create a historical record, is another option for a country seeking to identify the biological origins of certain individuals. Such a commission gives both the children and the raising parents an opportunity to come forward, make their voices heard, and have their stories recorded for history. A truth commission may appear to be a political compromise not worth accepting, given the seeming lack of consequences for the guilty parties, but the desire to know the facts may be strong enough to overcome any mixed emotions about the perpetrators' fate. In this scenario, the focus is on the children who were taken illegally, not on the people who took them.

The Argentine situation has relevance beyond its borders, and it can influence the ways that countries face the need to establish individuals' biological origins. When a country is focused on prosecution and justice for the victims, mandatory DNA testing for young children, or the imposition of substitute charges serves that purpose. A desire for the truth, however, is better served by granting amnesty in exchange for the facts, or by establishing a truth commission to listen and establish a historical record.

## Conclusion

The Argentine DNA law raises questions regarding the extent to which a government is willing to pursue its own goals of truth and accountability at the expense of its citizens' right to privacy. By not leaving an option

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208. See generally HAYNER, *supra* note 83, at 40-45.

respecting this right if the adult child refuses DNA testing, the law prevents the individual from exercising the right to privacy at all. The law pits the rights to truth and privacy against one another, with suboptimal results: the Abuelas get the information they desire, but their biological grandchildren who wished to retain their privacy are prevented from doing so. At the same time, the grandchildren unwillingly provide evidence that could put their raising parents in jail.

An examination of the development of the two rights in question leads to the conclusion that international human rights law is largely silent on this clash-of-rights issue and, thus, that it was well within the province of Argentina to legislate in a way that favored one right—truth—over another right—privacy. Where international law is silent or inconclusive, the *Lotus* principle from the Permanent Court of International Justice provides that states should be left to their own judgment. Though the outcome of the law may not be the best way for Argentina to address this piece of its past, the law is permissible from an international human rights standpoint.

Nonetheless, if what the Abuelas really desire is truth, Argentina should consider the possibility of offering substitute criminal charges for families in question whose children voluntarily submit to DNA testing, or amnesty to the raising parents in exchange for their testimony about the origins of their family. These two solutions address both the Abuelas' quest for truth and the adult children's right to privacy, and, thus, maximize satisfaction with the outcome better than the DNA law.

Unfortunately, Argentina is likely not going to be the only country to have to grapple with these issues. As long as there are situations where families are separated due to refugee-producing wars, natural disasters, or government-imposed repression, there exists the possibility of children being raised by people other than their biological parents, and, thus, the possibility that the biological origins of these children will need to be known at some point. When this point arrives, countries in this situation will look to Argentina, which has been wrestling with transitional justice issues for nearly thirty years, to examine its approach to this matter. As such, it is vitally important that, even as Argentina experiments with ways to address the problem of children who are taken from their disappeared parents or who are born in clandestine detention centers and then given to other families, Argentina considers the rights at issue and its place as a leader in the field of transitional justice.